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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SAMMY LOZANO, Defendant and Appellant.	B198578 (Los Angeles County Super. Ct. No. TA080053)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen Joseph Webster, Jr., Judge. Affirmed in part, reversed in part, and remanded.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Sammy Lozano, appeals from the judgment entered following his conviction, by jury trial, for premeditated attempted murder (2 counts), assault with a firearm (2 counts), shooting at an occupied motor vehicle, and possession of a firearm by a felon, with firearm enhancements (Pen. Code, §§ 664/187, 245, subd. (a)(2), 246, 12021, 12022.53, 12022.5).[1] Lozano was sentenced to state prison for a term of life plus 40 years.

The judgment is affirmed in part, reversed in part, and remanded for resentencing.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence.*

In the early morning hours of November 14, 2004, Jennifer Rodillas was driving her Honda Accord northbound on the 110 Freeway, going toward the 405 Freeway. Her boyfriend, Duke Tago, was in the front passenger seat. There were no other cars on the road. Rodillas looked in her rearview mirror and noticed a Nissan Xterra SUV speeding toward her. She moved into the left lane to allow the Nissan to pass, but it pulled up alongside and kept pace with her.

As Rodillas approached the 405 Freeway interchange, she tried to get back into the right lane, which was the transition lane, but the Nissan would not let her merge, forcing her to stay on the 110 Freeway. Then Rodillas heard two gunshots. Two bullets hit her car; one shattered the passenger window and one cracked the windshield. At the moment the gunshots were fired, the Nissan was the only other vehicle in the area. Although Rodillas could not see who fired the shots from the Nissan, she was certain that's where the shots came from.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Rodillas kept driving on the 110 Freeway. The Nissan, which had turned onto the 405 Freeway, suddenly cut back across the highway, drove down a grass embankment, and crashed into Rodillas. Her Honda spun around and came to a stop facing the center divider. She saw two people start to get out of the Nissan. Afraid for her life, Rodillas kept driving until she got home, from where she called 911.

Dwayne Degraffe, a California Highway Patrol officer, responded to a reported collision on the 110 Freeway near the 405 transition. When he arrived, he saw a Nissan Xterra on the shoulder of the road, along with a Toyota Solara. Defendant Lozano and Jorge Valencia were standing by the Nissan. There were four Asian men near the Solara. Lozano said he had lost control of the Nissan when a car cut in front of him. Because Lozano smelled of alcohol, Degraffe administered field sobriety tests and then arrested him for driving under the influence. Degraffe also spoke to the driver of the Solara, who did not mention anything about a shooting. The Solara's driver was also arrested for driving under the influence. Based on his investigation, Degraffe concluded the Nissan had hit the rear of the Solara.

Marlon Morgan, Los Angeles County Sheriff's Deputy, responded to a report of shots fired on the 110 Freeway near the 405. Morgan searched the area and found a four-barreled gun holding two live rounds and two bullet casings.

The police transported Rodillas and Tago to the shooting scene. By that time, the Nissan was on a flatbed truck. Lozano and Valencia were shown to Rodillas, but she could not identify either one.

The day after the shooting, Los Angeles County Sheriff's Detective Roger Digerlando went to Lozano's house to examine the Nissan. Lozano wasn't home, but he returned while Digerlando was talking to Lozano's wife. Digerlando asked Lozano if he had been involved in a collision, and Lozano initially said he couldn't remember. Then he said he had been on the 110 Freeway after doing some drinking and "that he must have got arrested for D.U.I. and hit somebody." When Digerlando asked if he had shot at anyone, Lozano said he had and that he had used a four-barreled .38-caliber handgun.

Lozano also said he thought he had been with someone named George, but when Digerlando asked who George Valencia was, Lozano said he didn't remember.

An expended bullet fragment was recovered from Rodillas's Honda.

2. *Defense evidence.*

Lozano's wife, Rosa, testified that when Digerlando first arrived at the house, she got the feeling he and his partner were threatening her. Digerlando asked if she had been involved in the car accident. When Rosa asked if she was under arrest, Digerlando said, "You know, if you're lying, we can take your kids away." Rosa testified she never heard Lozano tell Digerlando he had shot anyone.

3. *Procedural background*.

Lozano was tried three times. His first trial ended in a complete hung jury. A second trial resulted in convictions for driving under the influence and driving with a blood alcohol level of .08, an acquittal on the charge of having a concealed firearm in a motor vehicle, and a hung jury on the other counts. This appeal is from the third trial, at which Lozano was convicted for premeditated attempted murder, assault with a firearm, shooting at an occupied motor vehicle and possession of a firearm by a felon.

CONTENTIONS

1. The trial court erred by refusing to instruct the jury on third-party culpability.
2. The prosecutor committed misconduct.
3. The trial court erred by denying a new trial motion.
4. The trial court misunderstood its sentencing discretion with regard to the attempted murder convictions.
5. The trial court erred by imposing concurrent terms on counts 3, 4, 5 and 6.

DISCUSSION

1. *Trial court did not err by refusing to instruct on third-party culpability.*

Lozano contends the trial court erred when it denied his request for a jury instruction on third-party culpability. This claim is meritless.

"A criminal defendant may introduce evidence of third party culpability if such evidence raises a reasonable doubt as to his guilt, but the evidence must consist of direct

or circumstantial evidence that links the third person to the crime. It is not enough that another person has the motive or opportunity to commit it." (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) Lozano argues there was evidence to support such an instruction because "[o]n cross-examination, Rodillas testified that she had previously identified Valencia as 'either the driver or the shooter.' " Lozano's argument is predicated on a misreading of the trial record.

On direct-examination, Rodillas testified she had never identified Valencia as having been either the driver or the gunman in the Nissan. On cross-examination, the following colloquy occurred:

"Q. [D]o you remember on Tuesday [i.e., two days earlier] the prosecutor showed you photos of someone that you identified as Mr. Valencia?

"A. Yes.

"Q. Did he ask you questions about Mr. Valencia?

"A. Yes, he did.

"Q. What did you understand those questions to be in reference to?

"A. Um, if I've ever identified him at the – "

Rodillas was interrupted by an objection from the prosecutor which the trial court overruled. The following colloquy then occurred:

"Q. What did you understand those questions to be in reference to when the prosecutor asked you on Tuesday?

"A. From my knowledge, from what I know, is that I pinpointed Valencia as either the driver or the shooter."

At an ensuing sidebar discussion, defense counsel asserted Rodillas had just identified Valencia as being either the driver or the gunman. The prosecutor argued defense counsel's question had been vague and that Rodillas already testified she had never identified Valencia as one of the perpetrators.

To resolve the issue, the trial court held an evidentiary hearing (Evid. Code, § 402), at which Rodillas reaffirmed she had never identified Valencia as one of the perpetrators. Rodillas also testified she had been confused by defense counsel's question:

"Can I clarify? I misunderstood because I didn't know whether he was talking about identifying him at the scene or a picture, that's what I was thinking."

Then, on recross-examination in front of the jury, Rodillas testified she never saw any of the gunshots, never saw a gun, and did not know how many people were inside the Nissan, whether they were male or female, or whether "they were dressed as clowns or dressed as preachers . . . ."

When defense counsel later asked for a jury instruction on third-party culpability, the trial court denied the request on the ground there was "no real evidence linking Mr. Valencia to the crime." The trial court reasoned there was no evidence Rodillas had ever identified Valencia as a perpetrator, explaining: "[M]y understanding of the state of the evidence, and it was pretty much through your [i.e., defense counsel's] aggressive and complete and probing and thorough cross-examination basically answered the question. You [i.e., Rodillas] didn't see who was in the car, you were looking straight ahead. You were driving. You were trying to control the car."

The trial court did not err by denying the requested instruction. Other than Rodillas's confused response to defense counsel's vague question, there was no evidence Valencia had been either the driver or the gunman. There was no evidence Rodillas intended to contradict her earlier testimony that she never saw the perpetrators.

2. *There was no prosecutorial misconduct*.

Lozano contends the prosecutor committed misconduct, by telling the jury there was no evidence Valencia had been involved in the shooting, because the prosecutor himself had gotten that evidence excluded from the trial. This claim is meritless.

a. *Background*.

Tago and Rodillas testified at Valencia's parole revocation hearing. Rodillas apparently testified she could not identify Valencia. Tago apparently did identify Valencia as the person who had shot at him and crashed into Rodillas's car. However, Tago subsequently retracted that testimony and identified Lozano as the driver and gunman.

During Lozano's second trial, defense counsel tried to use the fact Rodillas had testified at Valencia's parole revocation hearing to suggest she had identified him as one of the perpetrators. Thus, defense counsel told the jury during his opening statement: "After that hearing, Mr. Valencia was sent to prison. So he was accused, he was confronted, he went to the hearing, and after the hearing he was sent to prison, based on the testimony of the state's star witness, Duke Tago." "[Rodillas] gives testimony about exactly what happened. Mr. Valencia is sent to prison. . . . [¶] Now, Ms. Rodillas never walks into the courtroom and says, 'It's Sammy. It's Mr. Lozano.' She never says that. But *the evidence we have is that she walked into a room, takes an oath along with Mr. Duke Tago, and [Valencia] is sent to prison*." (Italics added.) Defense counsel also asserted Valencia had already been convicted for the attempted murders: "[T]he facts as given . . . by the prosecution's own witnesses who, based upon their own sworn prior testimony, Jorge Valencia has already been charged, been accused, been confronted, and been sent to prison for this exact same crime. And at the end, we will argue to you that the fact that another man has been convicted of exactly the same crime – "

At this point, the prosecutor objected, complaining at sidebar that defense counsel well knew Valencia "was not charged or been convicted or sent to prison for being the shooter in [this] case but for being in the presence of other gang members." Asserting defense counsel was accusing him of "convicting two separate men for the same crime," the prosecutor argued: "I can't let that just sit with the jury. Because . . . it is absolute misconduct for me to charge two men with the same crime based on the same facts and convict them both."

Agreeing with the prosecutor, the trial court said defense counsel's statements to the jury had been inaccurate. The trial court then told defense counsel: "You want to clear it up [that] he was never charged, prosecuted and convicted . . . but it was a parole violation, fine. If not, then I'll have to do it."

When Rodillas testified at the second trial, defense counsel again suggested she had previously named Valencia as one of the perpetrators:

"Q. Ma'am, have you, on prior occasions, identified Mr. Valencia as the person who was driving and who wrecked into you [*sic*], true or false?

"A. I'm going to say false to that.

"Q. Why would you say that's false?

"A. I'm going to say it's false because I don't know who the driver was."

During a sidebar discussion, the trial court invited defense counsel to impeach Rodillas, if he could, with a prior inconsistent statement demonstrating she had identified Valencia but that, if he could not do so, then any mention of the parole revocation hearing was irrelevant.

Prior to the third trial, the trial court reiterated this ruling. Despite this reminder, defense counsel asked Rodillas, "You've been in a courtroom with Mr. Valencia on a prior proceeding; correct?" When the prosecutor objected, the trial court again reiterated the earlier ruling: "[T]he ruling was that she was there [i.e., at the parole revocation hearing], but Duke Tago was the one [who] made an identification, she never did. The court's exact ruling was . . . if Mr. Tago comes in, it's open game, which I agreed to, but with Mr. Tago. If Rodillas testifies, it's not to be brought up."

During closing argument, the prosecutor said Lozano had been "arrested for shooting the victims, and crashing the victims, and he's arrested for being the shooter and being the driver. [¶] Jorge Valencia is arrested for conspiracy. For acting in concert with the defendant. He's not charged by our office. Our office declined that prosecution. Whatever is . . . said during closing argument, try not to forget there is absolutely no evidence whatsoever that Jorge Valencia has been prosecuted, has been charged by me, he's not in jail for anything, and if there were any improper misconduct that I did, I wouldn't be standing here in front of you. There's a judge here that make [*sic*] sure that the attorneys stay in line with what is accurate."

Defense counsel objected: "That's not the court's position. That's not the court's duty. And the court is not in charge of what happens outside this courtroom. And I won't object about anything he's said, but now he's telling [the jurors] that this is your duty, and you would have told them or policed the D.A. in some way so that he wouldn't be here, and I don't think that's . . . an appropriate argument."

The trial court reminded the jury that the argument of counsel did not constitute evidence.

b. *Discussion*.

Lozano now argues: "By arguing that Valencia was not charged or prosecuted for the crimes, and that he was not in jail for anything, the prosecutor capitalized upon the trial court's exclusionary order prohibiting evidence of Valencia's parole violation. The argument misled the jury into believing there was no evidence of Valencia's guilt." Lozano asserts this was misconduct because "[a] prosecutor may not imply the non-existence of evidence in support of the defense after successfully excluding the evidence from the jury."

Lozano's claim is meritless. Although it is improper for the prosecutor to tell the jury there is no evidence to support a defense theory if it was the prosecutor who managed to get that evidence excluded (see, e.g., *People v. Varona* (1983) 143 Cal.App.3d 566, 568-570), that is not what happened here. If anything, the opposite occurred. Defense counsel persisted in trying to signal the jury that Rodillas had identified Valencia at the parole revocation hearing, despite the fact this was untrue and despite the fact the trial court had ordered defense counsel not to bring up the parole hearing unless he had evidence Rodillas identified Valencia there. We agree with the Attorney General that "the prosecutor's comments were merely aimed at contradicting defense counsel's improper implication that Valencia had already been charged with and convicted of the same charges that [Lozano] was facing."

Because the prosecutor's remarks during closing argument were a legitimate response to defense counsel's tactics, they did not constitute prosecutorial misconduct.

3. *New trial motion was properly denied.*

Lozano contends the trial court erred by denying his motion for a new trial. This claim is meritless.

Lozano filed a new trial motion, prepared by his trial attorney, which argued he had received ineffective assistance because "defense counsel did not competently locate, interview, and subpoena eyewitnesses," and that this prevented the jury from hearing crucial evidence. The motion stated: "After Mr. Lozano's trial was completed, Fletcher [i.e., defense counsel], unable to personally conduct post-trial investigation[,] retained a new investigator who was able to both locate, interview three percipient witnesses and obtain sworn declarations that completely supported Mr. Lozano's innocence . . . ."

Attached to the new trial motion were declarations from two of the Solara occupants: the driver, Chau Minh Tran, and one of the passengers, Tong Hourt Seav. Tran's declaration states: "My three friends and I were traveling northbound on the 110 freeway just south of the 405 interchange in the #1 lane when I noticed a grey colored SUV type vehicle in the far right lane of the 110/405 interchange. The SUV was just south of my vehicle when it suddenly lost control and cut across the northbound 110 freeway in front of me. [¶] I realized the SUV was going to collide with another vehicle (a red Honda Accord) that was also in the #1 lane, just north of my vehicle; therefore, I drove towards the right shoulder of the freeway in hopes of avoiding the collision. [¶] The SUV collided with the other vehicle but I was unable to move out of the way in time and my vehicle was also collided into by the SUV. [¶] At no time preceding the collision did I ever see sort [*sic*] of muzzle flash, flash of light or anything come from the SUV which would give me any reason to believe a gun was fired from anyone inside the SUV. [¶] I did not hear anything that could have sounded like a gunshot at any time before the collision."

Tong Hourt Seav's declaration was similar: "I was the left rear passenger of a red 2004 Toyota Solara . . . which was being operated by Chau Minh Tran on the night of November 14, 2004. [¶] My three friends and I were traveling northbound on the 110 freeway just south of the 405 interchange in the #1 lane when I noticed a grey SUV type vehicle in the far right lane of the 110/405 interchange. The SUV suddenly cut across the 110 freeway in front of our vehicle. Tran drove towards the right shoulder of the freeway and the SUV collided with our vehicle. [¶] At no time preceding the collision did I see any sort of muzzle flash, flash of light or anything come from the SUV which would give me any reason to believe a gun was fired from anyone inside the SUV. I did not hear anything that could have sounded like a gunshot just before the collision."

Apart from these two declarations, however, nothing in the new trial motion documented the due diligence efforts of either defense counsel or his investigator to find these witnesses. There was nothing to explain what had prevented the witnesses' discovery until after the third trial or what had ultimately enabled their discovery.

At the hearing on the new trial motion, defense counsel asserted he had not been able to locate the witnesses any earlier: "There was a continuance granted in the first trial to attempt to find these witnesses. They were very important witnesses and I could not find them. And I continued to try to find them throughout [the] trials. . . . It's absolutely certain I've tried to find them and tried to find them and could not find them." The prosecutor, noting defense counsel had listed these men as defense witnesses and had never before said he needed to find them, argued: "I believe . . . he had these witnesses during the first trial after he got the continuance and [he] made a strategic move to not call them." The trial court denied the new trial motion because "there really was no issue before the court that these people were unavailable . . . ."

b. *Discussion.*

"The standard for establishing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S.Ct. 2052] . . .) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid*.) ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citations.] ' "[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background." ' [Citation.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Lozano argues the trial court should have either found ineffective assistance of counsel, or ruled that the witness declarations constituted newly discovered evidence warranting a new trial. He asserts the declarations were completely exculpatory because these eyewitnesses "observed the entire incident and [would testify] that no shots were fired from appellant's vehicle." We are not persuaded.

As to the newly discovered evidence claim, not only does there appear to have been no showing the witnesses were unavailable, but there was no showing the defense had used due diligence to try to find them. As to the ineffective assistance of counsel claim, defense counsel told the trial court his performance had not been deficient: "And I continued to try to find [the witnesses] throughout [the] trials. . . . It's absolutely certain I've tried to find them and tried to find them and could not find them."

Moreover, if the trial record indicates anything, it is that defense counsel had located these witnesses. Prior to the second trial, defense counsel told the trial court that, despite having been unable to find the witnesses at one point during the first trial, "*We know where they're at now*." Defense counsel also said, "I will have all the witnesses I need, Your Honor." After the People rested their case, defense counsel said he was planning to have "Tran, the driver" testify. The record thus offers support for the prosecutor's argument that, after locating these eyewitnesses, defense counsel made a tactical decision not to have them testify.

Furthermore, both the ineffective assistance of counsel and newly discovered evidence claims are meritless because it is not reasonably probable there would have been a different outcome had the jury heard from the new witnesses. Contrary to Lozano's argument, these witnesses would not have necessarily contradicted Rodillas's testimony. Based on their declarations and the trial evidence, it appears Lozano crashed into the back of the Solara well after the shots had been fired. And Rodillas's testimony that shots had been fired was corroborated by: Lozano's admission to Digerlando that he had shot at someone on the freeway with a four-barreled .38; the recovery of that gun from the crime scene; and, the recovery of a bullet fragment from Rodillas's Honda.

Hence, neither ineffective assistance of counsel nor newly discovered evidence provided a legitimate basis for granting Lozano's new trial motion.

4. *Resentencing required on counts 1 and 2 so trial court may exercise discretion to impose consecutive or concurrent terms.*

Lozano contends the case must be remanded for resentencing on counts 1 and 2 because the trial court erroneously believed it was required to impose consecutive terms on those counts. The Attorney General properly concedes Lozano is correct.

At sentencing, the trial court said: "It doesn't seem that the court really has a lot of options, alternatives in this case with respect to counts one and two [the attempted murder convictions]. . . . And the court really has no discretion . . . . [¶] . . . I really have no leeway, no discretion, no options, no alternatives with respect to some of these counts." The trial court then imposed consecutive life terms on counts one and two. When defense counsel asked if there was any reason the court had decided against concurrent sentencing, the trial court said: "[I]t's separate victims. I think it has to be consecutive."

The trial court was wrong. Section 669 provides a trial court with discretion to impose either consecutive or concurrent prison terms: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction." (See *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1351 ["[T]he sentencing court's decision to impose concurrent or consecutive terms is discretionary and not mandatory. (§ 669.) Neither case law nor statutory authority restricts or precludes a sentencing judge from exercising discretion to impose a concurrent rather than a consecutive sentence . . . ."].)

We will remand this case to the trial court for resentencing on counts 1 and 2.

5. *Resentencing required on counts 3, 4 and 5 because of multiple punishment violation*.

Lozano contends the trial court's imposition of concurrent prison terms on counts 3, 4, 5 and 6 constituted improper multiple punishment under section 654. This claim has merit as to counts 3, 4 and 5, but not as to count 6.

As we said in *People v. Jones* (2002) 103 Cal.App.4th 1139, 1142-1143: "Section 654, subdivision (a), provides in pertinent part, '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' Section 654 therefore ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" [Citation.]' [Citations.] However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.] [¶] Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]"

In counts 1 and 2, Lozano was convicted for the attempted murders of Rodillas and Tago. In connection with those convictions, the jury found true an allegation that Lozano had discharged a firearm. (§ 12022.53, subd. (c).) In counts 3 and 4, Lozano was convicted of assaulting the same two victims with a firearm, based on the same acts that constituted the attempted murders. Hence, the sentences on counts 3 and 4 should have been stayed pursuant to section 654. Count 5, the conviction for shooting at an occupied motor vehicle, also arose out of the same acts constituting the attempted murders, and that sentence too should have been stayed pursuant to section 654.

But as to count 6, the conviction for possession of a firearm by a felon, we agree with the Attorney General that it was proper to impose an unstayed sentence. " 'Whether a violation of [former] section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) "[W]hen an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime. Therefore, section 654 will not bar punishment for both firearm possession by a felon (§ 12021, subd. (a)(1)) and for the primary crime of which the defendant is convicted." (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1141.)

Lozano arrived at the shooting scene already in possession of the gun. Hence, there was no error in imposing an unstayed prison term on count 6. We will, however, remand counts 3, 4 and 5 to the trial court for resentencing.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded to the trial court for resentencing in a manner consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.